

***United States Court of Appeals
for the Second Circuit***



EXHIBITS

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

76-5043

In the Matter of

ALBERT W. DUMOND, INC.

L. ROBERT LEISNER,

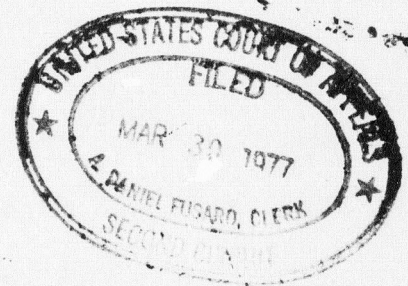
Co-counsel for the Trustee-Appellant

Docket No. 76-5043

Bankrupt

(Appeal from W.D.N.Y.)

E X H I B I T S



For Appellant:

L. ROBERT LEISNER
2 Kimberly Street #C
Albany, NY 12205

EXHIBITS

<u>EXHIBITS</u>	Page
1. Petitioner's Exhibit 1 - Announcement	1
2. Petitioner's Exhibit 2 - Announcement	2
3. Petitioner's Exhibit 3 - Stipulation of settlement dated 9/9/69	3
Order and indemnification agreement dated 3/25/68. 7	
Amended answer of M & T to trustee's petition dated 3/18/68.	14
4. Petitioner's Exhibit 4 - Letter of William H. Gardner to L. Robert Leisner dated 8/15/68.	27
5. Petitioner's Exhibit 5 - Affidavit of Chester A. Pearlman supporting L. Robert Leisner's request for fee allowance dated 2/9/76	34
6. Petitioner's Exhibit 6 - I.R.S. no change letter dated 3/26/71.	37
7. Petitioner's Exhibit 7 - I.R.S. no change letter dated 3/7/75	38

L. ROBERT LEISNER

Trial Attorney, Engaged in Tax Litigation for the Chief Counsel's
Office, United States Internal Revenue Service,
Cleveland and Northern Ohio for Three Years

Formerly in Law Practice in Erie and Cattaraugus Counties
in Western New York

Announces His Resignation from the United States Treasury Department
and Entry into the Private Practice of Law

1083 ELLICOTT SQUARE BLDG.
295 MAIN STREET, BUFFALO 3, N. Y.

MA. 7746

Res. DE. 7766

Exhibit I
Jan 1960

Limited Announcement:

To the Profession:

L. ROBERT LEISNER

Will continue to be available as Counsel to Members of the Profession in the Preparation and Trial of Tax Matters before the United States Internal Revenue Service, the Treasury Department, the United States Tax and District Courts.

2500 RAND BUILDING

BUFFALO 3, N. Y.

Phone: 852-2551

Exhibit II
Jan 1963

*Stipulation of settlement waiving
claim to rentals.*

9/9/69

M+T

3

Exhibit 3.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter of
ALBERT W. DUMMOND, INC.,
Bankrupt:
LOUIS R. STERNBERG, TRUSTEE
-v-
MANUFACTURERS AND TRADERS
TRUST COMPANY,
Respondent.

STIPULATION

No. BK - 1499

Louis R. Sternberg, the Trustee herein, by his attorneys, David J. Goldstein and L. Robert Leisner, and Manufacturers and Traders Trust Company, by its attorneys, Hodgson, Russ, Andrews, Woods & Goodyear, agrees as follows:

1. The pending proceeding herein, commenced by petition of the Trustee, verified February 21, 1968, is hereby settled on the following terms and conditions:

(a) Immediately upon the approval hereof by the Court, on a meeting of creditors duly called, Manufacturers and Traders Trust Company will pay to the Trustee the sum of \$25,000, less 25% of the 1969-70 School Tax upon the premises covered by the mortgage;

(b) Upon such approval, Manufacturers and Traders Trust Company ^{and its successors and assigns} will be deemed to have waived any and all further rights to file claims as a general or secured creditor

Enclosure B

in this bankruptcy estate and any claim heretofore filed by the Trust Company will be deemed to have been settled and satisfied by this agreement.

(c) Upon the above payment, the Trustee shall be deemed to have fully settled and compromised all issues existing between the Trustee and the Trust Company, whether heretofore presented or not, and the Trust Company shall thereupon be the sole owner of a certain mortgage, given by the bankrupt on or about March 10, 1966 and recorded in the Office of the Clerk of Erie County on or about said date, free and clear of any claim of the Trustee in Bankruptcy, his successors or assigns.

(d) Notwithstanding the above, the Trustee shall be entitled to collect from the tenants of the premises any and all rents due for the period of occupancy to and including October 31, 1969. Any rentals due or to become due for any period of occupancy commencing November 1, 1969, shall be payable to the Trust Company, as Assignee of the Rents under its said mortgage.

(e) The Trust Company shall assume all obligations to pay the School Tax on the premises for the year 1969-1970 (the parties understanding that all taxes and assessments on the premises have been paid with the exception of said School Tax).

(f) The Trustee intends to apply for the closing of the bankruptcy estate after approval and implementa-

-3-

tion of this agreement. The Trustee waives any requirement of law, whether State or Federal, that he be joined as a defendant in action to foreclose the mortgage held by the Trust Company and agrees that any such action may continue and a binding judgment of foreclosure issue without any requirement of such service and without any requirement for the reopening of this bankruptcy estate (if it has theretofore been closed) except that nothing herein shall be deemed to be a waiver by the Trustee of any surplus moneys which may arise in said foreclosure action. The Trust Company agrees that if any such surplus moneys do arise, it will apply for the reopening of this bankruptcy estate for the disposition of the same. The parties understand and anticipate, however, that no such surplus moneys will be available.

2. The Trustee agrees to apply without delay for the approval of this Stipulation and for the calling of a meeting of creditors to consider the same. Any order issued by the Court approving of this Stipulation will contain as part of its express provisions the terms and conditions of the settlement, so far as they are applicable.

3. This settlement agreement is contingent upon the approval by the Referee after submission of the same to the creditors at a meeting duly called. In the event such a meeting has not been held and such approval granted on or before October 10, 1969, it is agreed that the Trust Company may withdraw its consent to this settlement at any time before the entry of a final order approving the same, by serving written notice of its election to do so on the Trustee or either

-4-

of his attorneys.

Dated: September 9, 1969

FOR THE TRUSTEE:

David J. Goldstein
David J. Goldstein

L. Robert Leisner
L. Robert Leisner

FOR THE TRUST COMPANY:

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

By William H. Gardner
William H. Gardner

March 25 1968

Order & indemnification
agreement

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter
of
ALBERT W. DUMMOND, INC.,
Bankrupt.

ORDER
No. BK 65-1499

PROCEEDING COMMENCED BY LOUIS STERNBERG,
TRUSTEE, AGAINST RESPONDENT MANUFACTURERS
AND TRADERS TRUST COMPANY, BY PETITION
VERIFIED FEBRUARY 21, 1968, TO SET ASIDE
AN ALLEGED PREFERENCE, ETC.

This matter having again come on to be heard before this Court this 25th day of March, 1968, at 10:00 o'clock in the forenoon, and the Trustee having appeared by his attorney, David J. Goldstein, and Manufacturers and Traders Trust Company having appeared by its attorneys, Hodgson, Russ, Andrews, Woods & Goodyear (William H. Gardner, of counsel), and the Court having had due deliberation on the statements and argument of counsel, and having noted the Indemnification Agreement executed by Manufacturers and Traders Trust Company, dated March 25, 1968, annexed hereto, and this order having been approved as to form and content by the attorneys for the respective parties;

Now, therefore, it is ORDERED:

1. Original order to show cause, dated February 21, 1968--this matter is adjourned generally to be brought on before this Court at any time after May 1, 1968 (the adjourned date for depositions herein), on two day's written notice by either party to the other (excluding Saturdays, Sundays and holidays from said two day period).

Enclosure A

2. Order to show cause, dated March 18, 1968--

(a) Application for leave to commence a foreclosure suit. In consideration of the Trustee's indicated intent to attempt to negotiate a sale for the real property and expose the same therefor, Manufacturers and Traders Trust Company withholds its application for the time being, but has retained its right to renew its application at a later time, on appropriate notice to the Trustee. The Trustee will attempt to negotiate a favorable sale of the premises. Manufacturers and Traders Trust Company does not consent to be liable for any administration expenses in connection with said sale, but the matter of any liability therefor is withheld for future consideration upon the bringing in of an appropriate offer for purchase or purchase price resulting from auction by the Trustee, to be determined at that time. Manufacturers and Traders Trust Company reserves all rights to object to being made liable for administration expenses, it being its intent to refrain from in any way altering its position with respect to administration expenses at this time.

(b) Application for payment out of rent proceeds, in the hands of the Trustee, of taxes on the premises. The Trustee is directed to issue his two checks, respectively, as follows: (a) payable to the Erie County Commissioner of Finance in the amount of \$7,391.22, in payment of the back taxes for 1966 and 1967, listed below and (b) payable to Adam R. Rumley, Tax Collector, Town of Tonawanda, in the amount of \$4,650.39, in payment of the 1968 Erie County tax, listed below, provided that in the event the total rents heretofore collected by the Trustee from the real property are less than \$12,041.61, the Trustee may, in his sole discretion, pay only

so much of said taxes as can be paid out of rents so collected. Notwithstanding the payment of said taxes, Manufacturers and Traders Trust Company, in accordance with the annexed Indemnification Agreement, shall be liable for any administration expenses resulting from the collection of said rents, as if the same had not been paid to the respective tax officers, but only to the extent (if any) provided by law, it being the intention hereof that the liability, if any, of Manufacturers and Traders Trust Company shall not be altered or affected by the payments directed herein. The taxes hereinabove directed to be paid are as follows:

Back taxes:

Control #32-133:

1966, Certificate 23293, tax sale	\$42.22
1967, Certificate 23312, tax sale	44.30

Control #32-140

1966, Certificate 23300, tax sale	76.28
1967, Certificate 23319, tax sale	80.24

Control #32-141

1966, Certificate 23301, tax sale	87.02
1967, Certificate 23320, tax sale	102.22

Control #32-147

1966, Certificate 23307, tax sale	72.55
1967, Certificate 23326, tax sale	99.64

Control #31-290

1966, Certificate 22803, tax sale	2,291.88
1967, Certificate 22823, tax sale	<u>4,494.67</u>

Total, 1966 and 1967 taxes due in March \$7,391.22

1968 County Tax (including returned school tax, 67-68):

Control #32-133	36.77
Control #32-140	66.91
Control #32-141	87.43
Control #32-147	85.58
Control #31-290	<u>4,238.28</u>

Total 4,514.97

3% penalty due if paid in March, 1968

135.42

Total 1963 tax due in March 4,650.32

Total taxes due in March, 1963 \$12,041.61

DATED: March 25, 1963

James P. Pirtone
Referee in Bankruptcy

APPROVED AS TO FORM AND CONTENT:

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

By William H. Gardner
William H. Gardner

David J. Goldstein
David J. Goldstein

In the Matter
of
ALBERT W. DUMOND, INC.,
Bankrupt.

INDEMNIFICATION
AGREEMENT

WHEREAS, the undersigned, Manufacturers and Traders Trust Company, has applied by affidavit of William H. Gardner, sworn to March 18, 1963, for an order directing the Trustee to pay all outstanding taxes against real property of the Bankrupt herein, on which real property the Trust Company holds a mortgage, said taxes to be paid out of rents heretofore collected by the Trustee from tenants of the real property, which rents are claimed by Manufacturers and Traders Trust Company under provisions of said mortgage; and

WHEREAS, the Trustee has taken the position that Manufacturers and Traders Trust Company, in the event the mortgage is not set aside as a valuable preference, would be liable to the Trustee for administration expenses resulting from the collection of said rents, all of which would be payable out of said rents prior to remittance to the Trust Company; and

WHEREAS, the Trust Company desires to induce the Trustee to pay the taxes as requested by said affidavit of William H. Gardner, and for the purpose thereof, wishes to assure the Trustee that said payment will not alter or adversely affect his position with respect to the claimed obligation of Manufacturers and Traders Trust Company for administration expenses.

NOW, THEREFORE, Manufacturers and Traders Trust

Company does hereby agree to indemnify and hold the Trustee harmless, and to be personally liable for, any administration expenses which would have been chargeable to Manufacturers and Traders Trust Company, or collectible from said rents, in the event said rental moneys were retained by the Trustee and not paid out for taxes and in the further event that the mortgage, currently being challenged as an alleged voidable preference by the Trustee, were found not to be a voidable preference, it being the intention hereof that Manufacturers and Traders Trust Company shall be personally liable to the Trustee for so much of said rental moneys (if any) as could have been validly retained by the Trustee as administration expenses, notwithstanding the existence of a valid mortgage assignment interest therein, requiring payment of rentals collected by the Trustee to Manufacturers and Traders Trust Company. Nothing herein shall be construed to be a consent by the Trust Company that it be responsible or liable for any administration expenses not otherwise chargeable against it, nor shall there be construed herein any waiver by Manufacturers and Traders Trust Company of any defense which it might or could raise to any claim by the Trustee that it was so responsible.

DATED: March 25, 1968

MANUFACTURERS AND TRADERS TRUST COMPANY

By: _____


D. A. Birkby,
Assistant Vice President

STATE OF NEW YORK)
COUNTY OF ERIE) SS.

On this *25th* day of March, 1968, before me personally came D. A. BIRNEY, to me personally known, who, being by me duly sworn, did depose and say that he resides at No. *221 Wynnwood Avenue* in the Town of Tonawanda State of New York; that he is the Assistant Vice President of Manufacturers and Traders Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

William H. Gardner

WILLIAM H. GARDNER
Notary Public, State of
New York
Qualified in Erie County
Commission Expires 3/30/69

(SEAL)

11 M+T Claim of all Rentals Secured
(Mar 18, 1966) by a mortgage (c) demand for accounting

14

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter of
ALBERT W. DUMMOND, INC.,
Bankrupt.

No. BK 66-1499

AMENDED ANSWER OF RESPONDENT MANUFACTURERS AND
TRADEERS TRUST COMPANY TO TRUSTEE'S PETITION,
VERIFIED FEBRUARY 21, 1968

Manufacturers and Traders Trust Company, the Respondent herein, by its attorneys, alleges as follows as an Amended Answer to the petition of the Trustee, verified February 21, 1968:

1. Respondent denies that it has sufficient information to form a belief as to the allegations of paragraphs 1 and 2 of the petition.

2. Respondent admits the allegations of paragraphs 3 through 5, inclusive, and the second sentence of paragraph 6 of the petition.

3. Respondent denies the allegations of the first sentence of paragraph 6 and all of paragraphs 7 and 8.

Affirmative Defense and
Counterclaim

Respondent alleges as follows as an affirmative defense and counterclaim to the said petition of the Trustee:

4. On March 10, 1966, the Bankrupt duly executed a mortgage, dated on that date, a true copy of which mortgage is annexed hereto and made a part hereof as Exhibit A. Said mortgage

-2-

was given as continuing and collateral security for all indebtedness up to the sum of \$130,000.00 of principal, and in addition thereto, all interest thereon. The mortgage was thereafter duly recorded in the Erie County Clerk's Office on March 10, 1966 at 4:28 P. M. All of the provisions set forth in the mortgage are included herein by this reference as if separately and particularly restated as part hereof.

5. There remains due and owing to Manufacturers and Traders Trust Company a total indebtedness of \$137,780.08, repayment of all of which is secured by said mortgage, arising and calculated as follows:

a. Note given by Albert W. Dummond, Inc., the Bankrupt herein, dated November 27, 1964, payable on demand, with original and present balance of \$20,000, with interest at 6% from July 1, 1966, making balance of principal and interest as of March 1, 1968, \$22,000, with interest thereafter at 6% per annum on the sum of \$20,000 only \$22,000

b. Note given by Albert W. Dummond, Inc., the Bankrupt herein, dated May 17, 1965, payable on demand with original and present balance, principal \$10,000, with interest thereon from July 1, 1966, making balance of principal and interest as of March 1, 1968, \$11,000 together with interest at 6% per annum thereafter on the sum of \$10,000 only 11,000

c. Note given by Albert W. Dummond, Inc., the Bankrupt herein, dated June 15, 1964, payable on demand with original balance of \$20,000, with a present unpaid principal balance of \$5,000, together with interest thereon from July 1, 1966, making the entire amount owing as of March 1, 1968, \$5,500, together with interest at 6% per annum thereafter on the sum of \$5,000 only 5,500

-3-

d. Note given by Albert W. Dummond, Inc., the Bankrupt herein, dated July 1, 1964, payable on demand, with original and present principal balance of \$25,000, together with interest thereon from July 1, 1966, making an entire balance of principal and interest as of March 1, 1968, of \$27,500, together with interest at 6% per annum thereafter on the sum of \$25,000 only 27,500

e. Note given by Albert W. Dummond, Inc., the Bankrupt herein, dated July 17, 1964, payable on demand, with original and present principal balance of \$20,000, together with interest thereon at 6% per annum from July 1, 1966, making an entire balance of principal and interest as of March 1, 1968 in the amount of \$22,000 together with interest at 6% per annum thereafter on the sum of \$20,000 only 22,000

f. Note given by Dummond Equipment Corp., dated May 17, 1965, payable on demand, payment of which was guaranteed by Albert W. Dummond, Inc., by written guaranty dated June 22, 1964 [copy of which is annexed as Exhibit B] together with interest thereon at 6% per annum from July 1, 1966, making the entire amount of principal and interest owing as of March 1, 1968, \$11,000, together with interest at 6% per annum thereafter on the sum of \$10,000 only 11,000

g. Note given by Dummond Metal Window Erection Corp., dated May 4, 1964, payable on demand, with original and present balance of \$20,000 (which note was guaranteed by Albert W. Dummond, Inc., the Bankrupt by guaranty dated June 22, 1964, a copy of which is annexed hereto as Exhibit C), together with interest thereon at 6% per annum from July 1, 1966, making the entire balance of principal and interest as of March 1, 1968, \$22,000, together with interest thereafter at 6% per annum on the sum of \$20,000 only 22,000

h. Note given by Albert W. Dummond, Inc., the Bankrupt, dated November 27, 1964, in the original amount of \$20,000, with a balance of \$14,108.50, together with interest thereon at 6% per annum from July 1, 1966, making the entire balance of principal and interest owing as of March 1, 1968, \$15,519.35, together with interest at 6% per annum thereafter on the sum of \$14,108.50 only 15,519.35

-4-

Total balance of principal (\$124,108.50)
and interest (\$12,410.85) due as of
March 1, 1968 \$136,519.35

i. Mortgage tax advanced by Manufacturers
and Traders Trust Company 650.00

j. Insurance premiums paid by Manufacturers
and Traders Trust Company and reimbursable
under the Mortgage, paragraph 2 610.73

Total liquidated sum owing to Manufacturers
and Traders Trust Company, secured by
mortgage \$137,780.08

6. In addition to the above, there will be due and owing to Manufacturers and Traders Trust Company all sums paid or incurred by the Trust Company for the expense, including reasonable counsel fees, of defending this proceeding and of prosecuting and defending the rights and lien held by Manufacturers and Traders Trust Company under the mortgage referred to above, all as provided in paragraph 9(a) thereof, together with any sums, as specified in paragraph 9(b) of said Mortgage, in connection with the foreclosure of said Mortgage.

7. No portion of the sums hereinabove referred to have been paid, and the same are justly payable by the Bankrupt and secured by said Mortgage in accordance with its terms.

8. Subsequent to adjudication of bankruptcy herein, the Trustee has, on information and belief, collected rents out of the real property described in the petition herein and in said mortgage in the amount of \$600 each month, which sum amounts, on information and belief, to approximately \$12,000.

-5-

9. On information and belief, during said period no taxes have been paid with respect to said real property and the Trustee retains and continues to have in his possession all of said rentals.

10. There are presently due and owing as back taxes on said real property the following:

Back taxes:

Control #32-133:

1966, Certificate 23293, tax sale	\$ 42.22
1967, Certificate 23312, tax sale	44.30

Control #32-140

1966, Certificate 23300, tax sale	76.28
1967, Certificate 23319, tax sale	80.24

Control #32-141

1966, Certificate 23301, tax sale	87.02
1967, Certificate 23320, tax sale	102.22

Control #32-147

1966, Certificate 23307, tax sale	72.55
1967, Certificate 23326, tax sale	99.84

Control #31-290

1966, Certificate 22803, tax sale	2,291.88
1967, Certificate 22823, tax sale	4,494.67

1968 County Tax (including returned school tax, 67-68):

Control #32-133	36.77
Control #32-140	66.91
Control #32-141	87.43
Control #32-147	85.58
Control #31-290	<u>4,238.28</u>

Total	4,514.97
-------	----------

3% penalty due if paid in March, 1968	<u>135.42</u>
---------------------------------------	---------------

Total 1968 tax due in March	<u>4,650.39</u>
-----------------------------	-----------------

Total taxes due in March, 1968	\$12,041.61
--------------------------------	-------------

11. Pursuant to the provisions of paragraph 7 of said mortgage (copy of which is annexed hereto), all of the rents earned on said property were assigned to and became the property

-6-

of Respondent and Respondent is entitled to an accounting for the same, to the extent that the same had not been or are not hereafter actually applied in payment of outstanding taxes against said real property. Said assignment became effective on March 10, 1966, the date of said mortgage.

WHEREFORE, Respondent Manufacturers and Traders Trust Company respectfully prays that the petition of the Trustee, verified February 21, 1968, be denied, and that Respondent have affirmative relief as follows:

(a) Respondent prays for permission to immediately foreclose its mortgage, dated and recorded March 10, 1966, on such reasonable terms as the Court may provide, including, without limitation, permission to commence said foreclosure action forthwith during the pendency of this proceeding subject to the stipulation to be agreed to by Respondent that any sale in said foreclosure action will be subject to a final determination in this proceeding regarding whether or not the same constituted a voidable preference and that any proceeds resulting from said foreclosure sale (or from any resale thereafter by Respondent if Respondent purchases the premises at said foreclosure sale) will remain subject to further adjudication herein on the said petition of the Trustee.

(b) Respondent further prays for an order of this Court directing the Trustee forthwith to pay from any funds in his possession resulting from collection of rents from the said premises any and all outstanding taxes against the property, as

-7-

those taxes exist (with penalties) in March, 1968, and further directing that in the event the Trustee fails to make such payments on or prior to March 31, 1968, that any further penalties or interest which accrue thereafter shall be paid by the Trustee from general funds of the estate or otherwise paid without loss or damage to Respondent.

(c) Respondent further prays that upon final decision in this proceeding, Trustee be directed to account to Respondent for any and all rents collected on said premises, collected by Trustee and not remitted for the payment of real estate taxes on the property referred to in the mortgage referred to herein.

(d) Respondent further prays for such other and further relief as to the Court may seem just and proper.

Dated: March 18, 1968

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
Attorneys for Respondent

By: William H. Gardner
William H. Gardner

Office and Post Office Address:
One M & T Plaza, Buffalo, New York 14203

19 66, between

Made the 16th day of March,

ALBERT W. DUBEROND, INC., a corporation organized under the laws of the State of New York, having its principal office at 2801 Kenmore Avenue Town of Tonawanda, County of Erie and State of New York

herein referred to as the "Mortgages," and

MANUFACTURERS AND TRADERS TRUST COMPANY, a corporation organized under the laws of the State of New York, and having its principal office at No. 284 Main Street in the City of Buffalo, County of Erie, and State of New York, herein referred to as the "Mortgagee."

WITNESSETH THAT FOR THE better securing the Payment of said indebtedness the City of

2015

[illegible]

WITNESSETH, That for the better securing the payment of all promissory notes, checks, drafts and bills of exchange which have at any time heretofore been or which shall at any time hereafter be made, drawn, endorsed, guaranteed or accepted by the said Mortgagor, or which have heretofore been or shall at any time be discounted or paid by the Mortgagee for the benefit of the said Mortgagor when and as the same shall become due and payable, and any and all overdrafts made by the said Mortgagor and all balances of account and all sums of money which now are or shall at any time be due or owing by the said mortgagor to the Mortgagee on any account whatsoever, the Mortgagor hereby mortgages to the Mortgagee:

ALL THAT TRACT OR PARCEL OF LAND, situate in the Town of Tonawanda, County of Erie and State of New York, being part of Lot No. 43, Township 12, Range 8 of the Holland Land Company's Survey, bounded and described as follows:

BEGINNING at the point of intersection of the south line of Sawyer Avenue with the east line of Kenmore Avenue; running thence southerly along the east line of Kenmore Avenue, 577.65 feet to the north line of Parkedge Avenue; running thence easterly along the north line of Parkedge Avenue, 23.80 feet to the northwesterly line of lands appropriated by the People of the State of New York for the New York State Thruway by Notices of Appropriation recorded in the Erie County Clerk's Office in Liber 6015 of Deeds, page 133, Liber 6007 of Deeds, page 459, Liber 6015 of Deeds, page 598 and Liber 6007 of Deeds, page 158; running thence northeasterly along said northwesterly line of lands so appropriated, 593.60 feet to the intersection of said northwesterly line of lands so appropriated with the south line of Sawyer Avenue; running thence westerly along the south line of Sawyer Avenue, 165.93 feet to the point of beginning.

EXHIBIT

THIS MORTGAGE CONTAINS A RESTRICTION
AS TO ASSIGNMENT.

TOGETHER with all fixtures and articles of personal property now or hereafter attached to, or used in connection with, the premises, all of which the Mortgagor represents that he owns, including, but not limited to, furnaces and attachments, hot water tanks and heaters, laundry equipment, tubs and dryers, air-conditioning equipment, compressors, elevators, engines, motors, dynamos, incinerators, sump pumps, gas or oil burners, or coal stokers, fire preventive apparatus, plumbing and electrical fixtures, ranges, refrigerators, linoleum, curtain rods, venetian blinds and window shades, storm doors, storm windows, screens and awnings

and any and all replacements thereof and additions thereto, all of which shall be deemed to be and remain and form a part of the realty, and are covered by the lien of this mortgage. If the lien of this mortgage be subject, now or hereafter, to a conditional bill of sale or chattel mortgage covering any such property, all the right, title, and interest of the Mortgagor, in and to any and all such property, is hereby assigned to the Mortgagee, together with the benefits of any deposits or payments now or hereafter made thereon by the Mortgagor or the predecessors or successors in title to the Mortgagor in the mortgaged premises.

TOGETHER with all the right, title, and interest of the Mortgagor in and to all streets, alleys, highways, waterways, and public places in front of or adjoining the said premises, and all easements and rights of way, public and private, now or hereafter used in connection with said premises.

TOGETHER with any and all award and awards heretofore or hereafter made by any federal, state, county, municipal, or other governmental authority, or by whomsoever made in any condemnation proceedings whatsoever, to the present or subsequent owners of the premises, for the acquisition for public purposes of the mortgaged premises, and/or property or any portion thereof or any interest therein or use thereof, or for consequential damages on account thereof, including any award for any change of grade of streets affecting said premises, and also any award for any damage to the mortgaged property, which said awards are hereby assigned to the Mortgagee, its successors and assigns, with power to collect and receive and apply the same on the debt secured hereby, whether or not then due and payable.

TOGETHER with the appurtenances and all the estate and rights of the Mortgagor in and to said premises and property.

And the Mortgagor covenants with the Mortgagee as follows:

1. That the Mortgagor will pay the indebtedness as hereinbefore provided.
2. That the Mortgagor will keep the buildings on the mortgaged premises insured against loss by fire, and against loss by such other hazards, casualties, and contingencies, and in such form and amount as the Mortgagee may, from time to time, require, in companies approved by the Mortgagee, for the benefit of the Mortgagee; that he will assign and deliver the policies to the Mortgagee, and that he will reimburse the Mortgagee for any premiums paid for insurance by the Mortgagee on the Mortgagor's default in so insuring the buildings and mortgaged premises or in so assigning and delivering the policies. The acceptance by the Mortgagee of such fire or other insurance policies from the Mortgagor shall not be deemed or construed as an approval by the Mortgagee of the form, sufficiency, or amount of such insurance. In the event of the foreclosure of this mortgage, or a transfer of title to the mortgaged premises in extinguishment of the debt secured hereby, all right, title, and interest of the Mortgagor in and to any insurance policies then in force shall pass to the purchaser or grantee.
3. That should the Mortgagee by reason of insurance against loss by fire or other casualty, as aforesaid, receive any sum or sums of money, such amount may be retained and applied by the Mortgagee toward payment of the sum hereby secured, or the same may be paid over, either wholly or in part, to the Mortgagor to enable the Mortgagor to repair the buildings or property located on said premises, or to erect new buildings or property in their place, or for any other purpose satisfactory to the Mortgagee, without affecting the lien of this mortgage for the full amount secured hereby before the making of such payment.
4. That no building on the premises shall be removed or demolished or materially changed in character without the consent of the Mortgagee.

in the event of the death of the Mortgagor, the Mortgagee shall have the right to appoint a receiver to collect the rents from the premises, and to apply the same to the payment of the mortgage debt, as hereinafter provided, upon the happening of any of the following events or occurrences:

- (a) If the Mortgagor is adjudicated a bankrupt, or shall take advantage of any of the provisions of the Bankruptcy Act, or of any federal or state statute relating to insolvency, or shall make an assignment for the benefit of creditors, or be placed under the control or custody of any court, or
 - (b) If the Mortgagor shall fail promptly to repair or replace any buildings or improvements damaged by fire or other casualty, to the reasonable satisfaction of the Mortgagee, or shall fail to maintain the mortgaged premises in good, rentable, and tenable condition and state of repair, to the reasonable satisfaction of the Mortgagee within thirty (30) days after written notice and demand by the Mortgagee that the premises be restored to such condition and state of repair, or shall suffer or permit any waste, or
 - (c) If the Mortgagor or any tenant or occupant shall fail to comply promptly with all the requirements of the federal, state, and municipal governments, or of any departments, boards, or bureaus thereof having jurisdiction, or shall use the said mortgaged premises in any way that violates any federal, state, or local law, ordinance, rule, regulation, or requirements, or any restrictive covenants upon the use of said mortgaged premises, or
 - (d) If the Mortgagor shall assign the rents of said mortgaged premises and property, or any portion thereof, to anyone other than the Mortgagee without the written consent of the Mortgagee, or
 - (e) If the premises are conveyed while this mortgage shall remain a lien thereon, without the new owner duly executing an assignment and agreement to pay the indebtedness secured hereby, in form and substance satisfactory to the Mortgagee, and without the prior submission to the Mortgagee of a financial statement of the new owner and the prior approval by the Mortgagee of the title of the new owner, or
 - (f) If the Mortgagor shall refuse to give the Mortgagee reasonable opportunity to inspect the mortgaged premises and property from time to time, or
 - (g) If the Mortgagor, without the written consent of the Mortgagee, shall consent to the cancellation or surrender of any lease of the mortgaged premises, or any part thereof, having an unexpired term of one year or more, or shall modify such lease so as to shorten the term, or to decrease the rent, or to accept rent in advance of its due date under the terms of the lease, unless the same is forthwith paid on the indebtedness secured hereby, or
 - (h) If the Mortgagor shall violate or fail to perform promptly any other term, condition, provision, or covenant hereof, and such violation or failure shall continue for more than ten (10) days after written notice thereof shall have been given to the Mortgagor or to the then owner of the mortgaged premises.
6. That the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver without notice to the Mortgagor.
7. That in the event of any default on the part of the Mortgagor hereunder, and regardless of whether or not an action shall have been brought to foreclose this mortgage, the rents from the premises are hereby assigned to the Mortgagee as additional security for the payment of the indebtedness hereby secured, and in any such event the Mortgagee shall have the right to enter upon the premises, to take possession thereof for the account of the Mortgagor, manage the same, collect the rents therefrom, deduct from such rents all costs of entry, of collection, of administration, and reasonable counsel fees, and apply the remainder, after deducting therefrom the mortgage indebtedness, without affecting its right to maintain and continue any action theretofore instituted, or to bring any action thereafter, to enforce the payment of the debt secured hereby. In the event that the Mortgagee shall exercise the rights provided in this paragraph, it shall not thereby be deemed a mortgagee in possession, and it shall not in any way be made liable for any act either of commission or omission.
8. That in the event of any default on the part of the Mortgagor hereunder, while said Mortgagor occupies said premises, the Mortgagor agrees to pay the Mortgagee on demand, as a reasonable monthly rental for the premises, an amount at least equivalent to one-twelfth of the aggregate of the installments of interest payable in the then current year, plus the actual amount of the annual taxes, assessments, water rates, and insurance premiums for such year and, upon default in the payment of any sum due as such rental, the Mortgagee shall have the right to institute summary proceedings to obtain possession of said premises in the manner provided by Article 7 of the Real Property Actions and Proceedings Law for the recovery of demised premises after a default in the payment of rent.
9. (a) That if any action or proceeding, whether or not of an adversary nature, be commenced, except an action to foreclose this mortgage or to collect the debt secured hereby, to which action or proceeding the Mortgagee, as such, is made a party, or in which it becomes necessary to defend or uphold or retain or acquire title to or possession of the mortgaged premises or property or the lien hereof, all sums paid or incurred by the Mortgagee for the expense, including reasonable counsel fees, of such action or proceeding, or of the prosecution or of the defense of the rights and lien created hereby, shall be paid upon demand by the Mortgagee, together with interest thereon, and any such sums and the interest thereon shall be a lien on said premises prior to any right or title to, interest in or claim upon, said premises attaching or accruing subsequent to the lien hereof, and shall be deemed to be secured by this mortgage.
- (b) That if any action or proceeding be commenced by the Mortgagee to foreclose this mortgage or to collect the debt secured hereby, the Mortgagor agrees to pay to the Mortgagee, as reasonable attorneys' fees in connection with such action or proceeding, a sum which is equal to 15% of the unpaid balance of the debt secured hereby (less the allowance or allowances, if any, which the Mortgagee shall be awarded under the provisions of law), together with the expenses of collection, which sum and expenses are to be added to and collected in said foreclosure or other action or proceeding and shall be a lien on the said premises prior to any right or title to, interest in or claim upon, said premises attaching or accruing subsequent to the lien hereof and shall be deemed to be secured by this mortgage.
10. That the Mortgagor will pay all taxes, assessments, or water rates, and in default thereof, the Mortgagee may pay the same.
11. That the Mortgagor, within five (5) days upon request in person, or within ten (10) days upon request by mail, will furnish a written statement duly acknowledged of the amount due on this mortgage, and whether any offsets or defenses exist against the mortgage debt.
12. That notice and demand or request may be in writing and may be served in person or by mail.
13. That the Mortgagor warrants the title to the premises.
14. That the Mortgagor will receive the advances secured by this mortgage, and will hold the right to receive such advances, as a trust fund, to be applied first for the purpose of paying the cost of any improvement that has been commenced upon the mortgaged premises and has not been completed at least four months before the making and recording of this mortgage, and that the Mortgagor will apply the same first to the payment of the cost of improvement before using any part of the total of the same for any other purpose.
15. That in the event of foreclosure hereof, the said premises may be sold in one or more parcels, any provisions of law to the contrary notwithstanding.
16. That the Mortgagor, will, within five (5) days upon request in person, or within ten (10) days upon request by mail, furnish a verified statement of financial condition, including a detailed balance sheet, earnings statement, and surplus account.
17. That in the event the payment of any sum due hereunder shall become overdue for a period in excess of fifteen (15) days, a "late charge" of four cents (4c) for each \$1.00 so overdue may be charged by the holder hereof for the purpose of defraying the expense incident to handling such delinquent payment.
18. That the provisions of Section 254 of the Real Property Law are made a part hereof as though fully set forth herein, and it is the intent of the parties hereto that the provisions which are herein contained, other than those included in the New York statutory form of mortgage, shall be construed as affording to the mortgage rights additional to, and not exclusive of, the rights conferred under the provisions contained in the statutory form of mortgage, as construed under Section 254 of the Real Property Law.
19. That if more than one person joins in the execution of this mortgage, the covenants and agreements hereof shall be their joint and several obligations, and words of singular masculine import shall be read as if written in the plural, feminine, or neuter when circumstances require; that the terms, covenants, and agreements hereof shall be binding on the distributees, legal representatives, successors, and assigns of the Mortgagor, and shall inure to the benefit of the successors and assigns of the Mortgagee.
20. That the Mortgagor, if a corporation, warrants and represents that neither its Certificate of Incorporation, nor any amendment thereto, nor the By-laws of the Mortgagor, requires any vote or consent of its stockholders to mortgage property or any interest therein, and that the execution and delivery of this mortgage have been duly authorized by the Board of Directors of the Mortgagor.
21. That in the event the Mortgagor is a corporation, and the obligation secured hereby shall hereafter be held by a court of competent jurisdiction or department of the state, to be subject to the payment of any documentary stamp tax and the Mortgagor shall fail to pay such tax together with interest and penalties, if any, upon demand by the Mortgagee, the indebtedness secured hereby shall immediately become due and payable at the option of the Mortgagee.

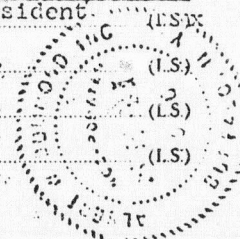
22. This mortgage is given and intended as a collateral and continuing security for the payment of all indebtedness heretofore or hereafter incurred by the Mortgagor as hereinbefore described up to the amount of \$130,000.00 of principal and in addition thereto all interest thereon, to be enforced by the Mortgagee to the extent of the amounts so advanced or to be advanced by the Mortgagee as hereinbefore described.

IN WITNESS WHEREOF, this mortgage has been duly executed by the Mortgagor the day and year first above written.

ALBERT W. DUMMOND, INC.

By Albert W. Dummond
President

FILED
MAR 10 4 23 PM '66
ERIE COUNTY
CLERK'S OFFICE



STATE OF NEW YORK } ss:
COUNTY OF

On the _____ day of _____ 19 _____ before me, the subscriber, personally came

to me known and known to me to be the same person described in and who executed the within instrument, and he duly acknowledged to me that he executed the same.

STATE OF NEW YORK } ss:
COUNTY OF ERIE

On the 10th day of March, 19 66, before me personally came ROBERT P. DUMMOND

that he resides at No. 408 Norwood Avenue, Buffalo, New York; that he is the President of ALBERT W. DUMMOND, INC., the corporation described and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

Ser. B. I. _____ 19 _____
Received \$ _____ in payment of tax now due on within instrument.
[Signature] Notary Public, Erie Co., Pa.

CLERK OF SUPREME COURT,
ERIE COUNTY, N.Y.
[Signature]

EXHIBIT A (CONT'D)

Mortgage
ALBERT W. DUMMOND, INC.
To
FIDELITY AND SECURITY TRUST COMPANY
MAR 10 19 66
STATE OF NEW YORK
of
RECORDED
on the 10th day of March, 1966
at 2:00 o'clock P.M.
[Signature] Clerk
[Signature] of Mortgages at Page 307

For and in consideration of the sum of One Dollar (\$1.00) to the well signed in hand paid by MANUFACTURERS AND TRADERS TRUST COMPANY, a banking corporation organized under the laws of the State of New York, and having its principal office in the City of Buffalo, New York, (hereinafter called the "TRUST COMPANY"), the receipt whereof is hereby acknowledged, and in consideration of the extension of credit by the TRUST COMPANY to

Durand Equipment Corp. a corporation

whose principal place of business is located at 25601 Lenox Avenue, Tonawanda, N.Y. (hereinafter called the "DEBTOR"), and for other good and valuable considerations the undersigned hereby guarantees to the TRUST COMPANY, its successors or assigns, the payment of all bills, notes, checks, drafts, trade acceptances and other evidence of debt, and all other debts, liabilities and obligations of every kind and nature, whether herebefore or hereafter created, arising or existing (all hereinafter called the "Indebtednesses") at any time due or owing from the DEBTOR to the TRUST COMPANY, its successors or assigns, or upon or by reason of which the DEBTOR may or shall be liable or obligated to the TRUST COMPANY, or its successors or assigns, as maker, drawer, endorser, acceptor or otherwise, in any

manner whatsoever without any limitation as to amount, together with any and all legal and other expenses of collection including reasonable attorneys' fees. And the undersigned does hereby consent and agree as follows:

1. This guaranty shall be a continuing and collateral guaranty independent of and in addition to any other security, or securities, indentment, or indentments, held by the TRUST COMPANY for said Indebtednesses, or any part thereof, and shall remain in full force and effect until the TRUST COMPANY, or its successors or assigns, shall actually receive a written notice of its cancellation signed by the undersigned, and after such notice shall remain in full force and effect as to all Indebtednesses then existing and all renewals, extensions, and modifications thereof whether made before or after receipt of such notice. The payment in full of all Indebtednesses outstanding at any time or from time to time shall not discharge or otherwise affect the liability of the undersigned hereunder in respect to Indebtednesses thereafter arising prior to the receipt of notice of cancellation as herebefore provided.

2. The liability of the undersigned hereunder shall not be impaired, altered or otherwise affected by the taking of any other or additional security for such Indebtednesses, or any part thereof, or by any neglect, failure or omission to hold, protect, or realize upon any such other security, or by any extension of credit in excess of the amount of this guaranty (if any), or by any renewal, or renewals, or extensions of the time of payment, modification of the terms, compounding, compromise or discharge of any or all of said Indebtednesses whether before or after the cancellation of this guaranty by notice, or otherwise, or by any other act or thing whatsoever except the payment of each and all of the Indebtednesses hereby secured, each and all of which are hereby consented to without notice to the undersigned, and in case of any default by the DEBTOR the liability of the undersigned hereunder shall be direct, immediate and absolute and shall not be conditional or contingent upon the pursuit, exercise or prosecution by the TRUST COMPANY, or its successors or assigns, of any other remedy, or remedies whatsoever, and the TRUST COMPANY shall have and may exercise any or all of the rights and remedies against the undersigned that it might against a principal debtor upon a past due liquidated obligation. Any payment of principal or interest, acknowledgment, promise or other act by or on behalf of the DEBTOR in respect to the Indebtednesses, the effect of which would be to take any right which the TRUST COMPANY may have against the DEBTOR out of the operation of any statute of limitations, shall have a like effect in respect to any right which the TRUST COMPANY may have against the undersigned hereunder, notwithstanding lack of notice thereof or consent thereto by the undersigned.

3. Presentment for payment, demand, protest and notice of protest and non-payment to the undersigned and to the DEBTOR and to all other persons of all bills, notes, checks, drafts, trade acceptances and other orders and promises for the payment of money and notice of the acceptance of this guaranty and notice of the extension of credit and making of advances hereunder and notice of default hereunder are, and each and all of them are hereby waived.

4. In case of the insolvency, bankruptcy, failure, receivership, liquidation or dissolution of the DEBTOR or in case of any default in the payment of either the principal or interest, or any part thereof, of any such Indebtednesses when due, each and all of the said Indebtednesses to the amount of this guaranty (if any), shall, at the option of the TRUST COMPANY, or its successors or assigns, become immediately due and payable as though said Indebtednesses had matured by lapse of time, and irrespective of any other contract or agreement fixing a definite date or dates of maturity.

5. This guaranty is made and entered into by the undersigned in connection with, and incidental to, the exercise by the undersigned of its corporate rights, powers, purposes, privileges and franchises, and the undersigned is duly authorized to guarantee the Indebtednesses.

6. This guaranty shall bind the undersigned, its successors and assigns.

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed by its duly authorized officer and its corporate seal to be hereunto affixed this 22nd day of June in the year Nineteen Hundred and Sixty four

Albert W. Durand Inc.

ATTEST:

(SEAL)

By

Its

President.

Secretary.

STATE OF NEW YORK,
COUNTY OF ERIE,
CITY OF BUFFALO.

On this 22nd day of June Nineteen Hundred and sixty four before me personally

came Robert P. Durand to me personally known, who being by me duly sworn did

depone and say that he resides in Buffalo New York; that he is President

of Albert W. Durand Inc.; the corporation described in and which executed the above Instrument; that he knows the seal of said corporation; that the seal affixed to said Instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Notary Public, State of New York
Filed in Erie County
My Commission Expires March 30, 1968

Notary Public, Erie County, New York.

EXHIBIT

B

For and in consideration of the sum of One Dollar (\$1.00) to the undersigned in hand paid by MANUFACTURERS AND TRADERS TRUST COMPANY, a banking corporation organized under the laws of the State of New York and having its principal office in the City of Buffalo, New York, (hereinafter called the "TRUST COMPANY"), the receipt whereof is hereby acknowledged, and in consideration of the extension of credit by the TRUST COMPANY to

Diamond Metal Window Erection Corp. a corporation

whose principal place of business is located at 2601 Kenmore Avenue Tonawanda, N.Y. (hereinafter called the "DEBTOR"), and for other good and valuable considerations the undersigned hereby guarantees to the TRUST COMPANY, its successors and assigns, the payment of all bills, notes, checks, drafts, trade acceptances and other evidences of debt, and all overdrafts, indebtednesses, liabilities and obligations of every kind and nature, whether heretofore or hereafter created, arising or existing (all hereinafter called the "Indebtednesses") at any time due or owing from the DEBTOR to the TRUST COMPANY, its successors or assigns, or upon or by reason of which the DEBTOR may or shall be liable or obligated to the TRUST COMPANY, or its successors or assigns, as maker, drawer, endorser, acceptor or otherwise, in any

manner whatsoever without any limitation as to amount together with any and all legal and other expenses of collection including reasonable attorneys' fees.

And the undersigned does hereby consent and agree as follows:

1. This guaranty shall be a continuing and collateral guaranty independent of and in addition to any other security, or securities, indorsement, or indorsements, held by the TRUST COMPANY for said Indebtednesses, or any part thereof, and shall remain in full force and effect until the TRUST COMPANY, or its successors or assigns, shall actually receive a written notice of its cancellation signed by the undersigned, and after such notice shall remain in full force and effect as to all Indebtednesses then existing and all renewals, extensions, and modifications thereof whether made before or after receipt of such notice. The payment in full of all Indebtednesses outstanding at any time or from time to time shall not discharge or otherwise affect the liability of the undersigned hereunder in respect to Indebtednesses thereafter arising prior to the receipt of notice of cancellation as hereinbefore provided.

2. The liability of the undersigned hereunder shall not be impaired, altered or otherwise affected by the taking of any other or additional security for such Indebtednesses, or any part thereof, or by any neglect, failure or omission to hold, protect, or realize upon any such other security, or by any extension of credit in excess of the amount of this guaranty (if any), or by any renewal, or renewals, or extensions of the time of payment, modification of the terms, compounding, compromise or discharge of any or all of said Indebtednesses whether before or after the cancellation of this guaranty by notice, or otherwise, or by any other act or thing whatsoever except the payment of each and all of the Indebtednesses hereby secured, each and all of which are hereby consented to without notice to the undersigned, and in case of any default by the DEBTOR the liability of the undersigned hereunder shall be direct, immediate and absolute and shall not be conditional or contingent upon the pursuit, exercise or prosecution by the TRUST COMPANY, or its successors or assigns, of any other remedy, or remedies whatsoever, and the TRUST COMPANY shall have and may exercise any or all of the rights and remedies against the undersigned that it might against a principal debtor upon a past due liquidated obligation. Any payment of principal or interest, acknowledgment, promise or other act by or on behalf of the DEBTOR in respect to the Indebtednesses, the effect of which would be to take any right which the TRUST COMPANY may have against the DEBTOR out of the operation of any statute of limitations, shall have a like effect in respect to any right which the TRUST COMPANY may have against the undersigned hereunder, notwithstanding lack of notice thereof or consent thereto by the undersigned.

3. Presentment for payment, demand, protest and notice of protest and non-payment to the undersigned and to the DEBTOR and to all other persons of all bills, notes, checks, drafts, trade acceptances and other orders and promises for the payment of money and notice of the acceptance of this guaranty and notice of the extension of credit and making of advances hereunder and notice of default hereunder are, and each and all of them are hereby waived.

4. In case of the insolvency, bankruptcy, failure, receivership, liquidation or dissolution of the DEBTOR or in case of any default in the payment of either the principal or interest, or any part thereof, of any such Indebtednesses when due, each and all of the said Indebtednesses to the amount of this guaranty (if any), shall, at the option of the TRUST COMPANY, or its successors or assigns, become immediately due and payable as though said Indebtednesses had matured by lapse of time, and irrespective of any other contract or agreement fixing a definite date or dates of maturity.

5. This guaranty is made and entered into by the undersigned in connection with, and incidental to, the exercise by the undersigned of its corporate rights, powers, purposes, privileges and franchises, and the undersigned is duly authorized to guarantee the Indebtednesses.

6. This guaranty shall bind the undersigned, its successors and assigns.

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed by its duly authorized officer and its corporate seal to be hereunto affixed this 22nd day of June in the year Nineteen Hundred and sixty four

Albert W. Durmond Inc.

Albert W. Durmond

ATTEST:
(SEAL)

By _____ Its _____ President.

Secretary.

STATE OF NEW YORK,
COUNTY OF ERIE, } ss:
CITY OF BUFFALO.

On this 22nd day of June Nineteen Hundred and sixty four before me personally came Robert P. Durmond to me personally known, who being by me duly sworn did depose and say that he resides in Buffalo New York; that he is President of Albert W. Durmond Inc.; the corporation described in and which executed the above Instrument; that he knows the seal of said corporation; that the seal affixed to said Instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

LeRoy R. Rupp Reg. No. 457
F. 560 Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1965

LeRoy R. Rupp
Notary Public, Erie County, New York.

EXHIBIT C

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

ATTORNEYS AT LAW

1800 ONE M & T PLAZA

BUFFALO, N.Y. 14203

GEORGE A. NEWBURY
COUNSELTELEPHONE
716 853-4000

HUGH MCM RUSS
RALPH M ANDREWS
HOMER H WOODS
LAURENCE R GOODYEAR
ROBERT R BARRETT
JOHN E DICKINSON
EDWIN O TILTON
ARNOLD T OLENA
DONALD C LUBICK
GROVER R JAMES JR
THORNTON G EDWARDS
VICTOR T FUZAK
GORDON A MACLEOD
RICHARD E HEATH
DOUGLAS W KUHN
RALPH W LARSON
HUGH MCM RUSS, JR
CHARLES J HAHN
STEPHEN H KELLY
DAVID C BERG
GEORGE W MYERS, JR
JAMES A PORTER
ROBERT H MILTENBERGER, II
WILLIAM H GARDNER
JOHN J COONEY
JOHN C BARBER, JR
ROBERT M WALKER
ANTHONY L DUTTON
JAMES M WADSWORTH

Exhibit 4

August 15, 1969

L. Robert Leisner, Esq.
806 Rand Building
Buffalo, New York 14203

Dear Mr. Leisner:

Re: Albert W. Dummond, Bankrupt

This letter is pursuant to our conference in this office on Tuesday of this week. At that time, we discussed the position of the parties in the pending proceeding to set aside the mortgage of Manufacturers and Traders Trust Company. We both agreed that before further steps were taken in this proceeding, it would be advisable to explore such avenues of accomodation as seem appropriate.

At the conclusion of our conference, I asked for and obtained your assurance that if the Trust Company reduced a settlement offer to writing, the existence of that writing or the contents thereof would be treated in confidence and, specifically, would not be brought to the attention of the Referee in bankruptcy unless a signed stipulation of agreement, entered into conditioned upon the approval of the Referee in Bankruptcy, was actually executed. Our concern in this regard stems from the fact that Mr. McGuire will have to sit in judgment on the facts in connection with the pending litigation, if trial actually becomes necessary, and we do not wish to have him subjected to unconscious influences which might arise from the knowledge hereof.

I have reviewed our conference in detail with the Trust Company. Mr. Readett attended the conference, of course, and therefore was well aware of the nature of our discussions.

Under the circumstances, the Trust Company offers

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

(2)

L. Robert Leisner, Esq.

August 15, 1969

the following as a basis for settlement of the pending claims:

1. Upon court approval of a stipulation of settlement to be entered into between the parties, upon an appropriate notice to the creditors, and entry of an order confirming the validity of the Trust Company's mortgage and consenting to the foreclosure thereof by the Trust Company in an appropriate state court, the Trust Company will immediately pay the sum of \$25,000 to the trustee in bankruptcy.

2. The Trust Company, acting in its own behalf and subject to such discretion and judgment as it deems appropriate in the management of its own affairs, would then take steps necessary to sell the property, including foreclosure of the mortgage in accordance with the state law. It would be anticipated that the Trust Company would move expeditiously in this regard, consistent with its substantial rights vis-a-vis the public, the tenants, and the general economic situation. The Trust Company, however, would be conscious of the fact that the bankruptcy proceedings must be closed within a reasonable period and would, accordingly, attempt to proceed without unnecessary delay.

3. Upon the sale of the real property in foreclosure or, if the Trust Company was the successful purchaser thereon, upon the resale of the property by the Trust Company:

(a) The Trust Company would retain any net, effective sale price of \$100,000.00 or less for itself without further obligation to the trustee;

(b) In the event the property was sold for a net, effective sale price in excess of \$100,000.00, one-third of any excess would be paid to the trustee and the balance; or two-thirds of the excess, would be retained by the Trust Company; and

(c) Within thirty days following the closing of any such sale and the determination of the net, effective sale price, the Trust Company would be permitted to file a general, unsecured claim for the difference between the net sale price and any amount properly due from the bankrupt to the Trust Company as of the date of bankruptcy, excluding, however, any attorney's fees or interest. As a matter of information, the principal debt owing

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

(3)

L. Robert Leisner, Esq.

August 15, 1969

to the Trust Company as of the date of bankruptcy was \$124,108.50.

(d) Notwithstanding the above, in the event the property had not been sold and the net, effective sale price determined within eighteen months of the court approval of the settlement, the Trust Company would forfeit its right to file a general, unsecured claim for any such deficiency if the trustee in bankruptcy elected to proceed to close the estate thereafter without awaiting the final disposition of the real property.

(e) In the event the estate was closed prior to the disposition of the property and the property was subsequently disposed of at a net, effective sale price in excess of \$100,000.00, the Trust Company would cause a report of this fact, with full details, to be mailed to each and all of the creditors who have filed claims in this bankruptcy proceeding and, provided application was made and granted to reopen the bankruptcy estate for this purpose within three months after said notice, would pay one-third of the excess amount to a trustee in bankruptcy; subject to the right of the Trust Company, in that event, to file a general unsecured proof of claim, simultaneously with the payment, which proof of claim would be honored retroactively as if it had been filed prior to the earlier distribution to creditors and closing of the estate, up to but not in excess of a sum on which the dividend could be paid out of funds available in the re-opened bankruptcy estate.

4. Upon approval of any stipulation of settlement, the Trust Company would release any claim it has pursuant to the mortgage held by it to rents theretofore collected by the trustee in bankruptcy, with the exception that the trustee would cause to be paid out of rents collected from the property the 1969-1970 school tax on the premises, together with any interest or penalties to date of payment.

5. In addition to the above, the Trust Company would waive any claim to rents on the premises to and including any rental payments payable, pursuant to the provisions of existing leases, during the month of October, 1969. Any and all rents payable on or after November

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

(4)

L. Robert Leisner, Esq.

August 15, 1969

1, 1969 would be subject to the assignment thereof set forth in the Trust Company's mortgage, free and clear of any claim of the trustee.

6. For purposes of the agreement between the parties, the term "net, effective sales price", as used herein and in any stipulation of settlement hereafter executed by the parties, would be deemed to be the sale price received by the Trust Company, subject to the following:

(a) The parties recognize that it may be necessary for the Trust Company, in the process of negotiation of the sale of the property, to accept a purchase money mortgage as part of the consideration on the sale. If said mortgage provides for interest at a rate less than the regular prime rate as in effect at the time of the closing of the sale, plus one per cent, the net sale price will be deemed to be the sum which, based upon financing at prime plus one per cent, would have produced the total principal and interest payments provided by the mortgage, together with any down payment on the transaction (the parties intending hereby to recognize any abnormal interest factor included in the stated sale price as being interest rather than actually proceeds of the sale); and

(b) The said adjusted net, effective sale price will apply for purposes of determining whether or not the Trust Company has recovered \$100,000.00, so as to entitle the trustee in bankruptcy to a portion of any excess thereof, but, for purposes of determining any deficiency claim by the Trust Company, the net sale price without adjustment for interest will apply.

(c) For purposes of determining the "net sale price" or "net effective sale price", there will be deducted from the gross sale price the following expenses only:

(1) Reasonable attorney's expenses actually incurred by the Trust Company in connection with the prosecution of any foreclosure action, negotiations for any release of existing leases, negotiations for any contract of sale or any other direct legal services rendered subsequent to approval of the

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

(5)

L. Robert Leisner, Esq.

August 15, 1969

settlement in connection with preparing the property for sale and effectuating the sale;

(2) Any expenses of advertising undertaken by the Trust Company in order to consummate the sale;

(3) Any commission payable to a real estate broker, if one is hired by the Trust Company in connection with the sale;

(4) Any expenses or disbursements to remove or correct any cloud on the title or any lien on the real property;

(5) Any premium for title insurance, if title insurance is required to be provided at the expense of the Trust Company in accordance with any contract negotiated by the Trust Company and

(6) Expenses for searches, surveys or any other direct expenses of sale of the premises.

In the events the Trust Company has to provide improvements in connection with the sale or financing of the purchase, under the contract ultimately agreed upon, the cost of the improvements will be eliminated for purposes of arriving at the net sale price or net, effective sale price under our arrangement.

Alternatively to the above, if the trustee prefers, the Trust Company would be willing to settle the controversy on the basis of a cash payment of \$25,000 upon court approval of the settlement with the future rents from the property to be divided as indicated above and with a complete waiver by the Trust Company of any further claim in the bankruptcy estate. This would have the advantage of avoiding any further claim by the Trust Company (which you recognized would amount to an effective sum of 25% of the deficiency, in view of the probable financial condition of the estate) and enable the estate to be promptly closed. You would have the further benefits of rents through October, the same as under the first proposal, subject, of course, to payment of the school tax.

As you observed during our conference on Tuesday, the Trust Company is undoubtedly in a better position to effectuate the sale of the property than is the trustee for a number of reasons. Initially, we are in a position to solve the problem in connection with the lease held by West End Brewery.

(6)

L. Robert Leisner, Esq.

August 15, 1969

We can provide purchasers with financing at a time when the money market is very tight. By contrast, the trustee is probably limited to a sale to investors, such as was previously held, with limited and unsatisfactory results. At the same time, the Trust Company is being left with the ultimate risk on the property, inasmuch as it will have to "live with" any mortgage arrangement it makes on the premises for several years to come.

Viewing the factual situation the trustee finds himself in, the settlement appears beneficial for a number of reasons. The trustee has had the unencumbered use of the profits from the premises for a period of three years, subject only to payment of taxes. We calculate that the trustee has approximately \$50,000.00 in the estate as a result of this fact. The trustee will immediately receive \$25,000.00 as a further asset of the estate and will further receive two additional months' rents under the proposed arrangement. Additionally, the trustee has the opportunity to participate in any profits in excess of \$100,000.00, if he elects to accept the first proposal.

In connection with the evaluation of the pending claim of the trustee against the Trust Company, we believe the trustee must realistically assess his position on that claim. As we advised at the conference, the Trust Company at no time received direct knowledge of insolvency on the part of the bankrupt when it took its mortgage in early 1966. We are confident that the referee will be satisfied, upon the trial of this matter if that becomes necessary, that the Trust Company was not in a position to be charged with reasonable notice of insolvency. This seems clear, whatever the fact may be regarding the existence of insolvency as of March, 1966, notwithstanding the fact that the company was in need of cash during that period.

Even on the question of the existence of insolvency in March, 1966, however, the trustee's claim is by no means assured. This proceeding was an involuntary petition of bankruptcy in the first place. The schedules actually show a condition of solvency as of the date of bankruptcy itself, if it is recognized that the summary sheet incorrectly shows the real estate value at \$60,000.00, the calculated equity in the property, rather than at the total value of \$160,000.00. Additionally, the appraiser appointed on behalf of the estate has appraised the property at \$175,000.00. Accordingly, the depreciated book value of the property as set forth in the exercise by Messers. Fiddler & Company at approximately

(7)

L. Robert Leisner, Esq.

August 15, 1969

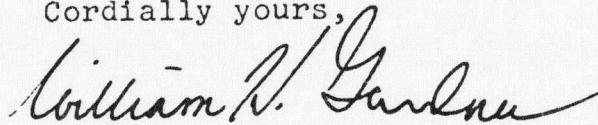
\$103,000.00 is highly suspect and apparently understated by at least \$50,000.00. Other areas in that statement are sufficiently dubious to make highly doubtful the proposition that the trustee can establish a state of insolvency as of March, 1966, as opposed to the financial condition of the company as it went increasingly down hill during the months that followed.

In other words, the Trust Company feels very strongly that the settlement offer suggested herein is a most generous settlement offer to the trustee in light of the circumstances surrounding this entire matter. We have attempted to carefully consider the trustee's position, as expressed by you, and we are satisfied that the within represents the final offer that we are in a position to make. Accordingly, if it is not satisfactory, we feel we should proceed expeditiously to the depositions and trial of this matter.

I will be out of the office for approximately two weeks, but I expect to return to my desk the first week in September. Hopefully, we may have indication from the trustee at that time as to his acceptance or rejection of the within offer. If it is not acceptable, we propose to proceed with the depositions on September 9, 1969, pursuant to the revised notice of deposition which you should have received by the time this letter is in your hands.

In making this information available to Mr. Goldstein and to the trustee, will you kindly obtain their consent to the agreement of confidentiality we have entered into. We recognize, of course, that the referee may inquire whether possibilities of settlement have been explored and that this inquiry will require direct answer. The contents of this letter, however, are deemed confidential until and unless they are reduced to writing in a stipulation approved by the parties, subject to the approval of the court.

Cordially yours,


William H. Gardner

WHG:clp

CC: D. W. Readett

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Exhibit 5

IN THE MATTER

OF

ALBERT W. DUMMOND INC.

AFFIDAVIT

BK - 661499

STATE OF NEW YORK)
) SS:
COUNTY OF ERIE)

CHESTER A. PEARLMAN, being duly sworn, does depose and say:

That he is an attorney-at-law duly admitted to practice in the State of New York and in the United States District Court for the Western District of New York and maintains a law office in the City of Buffalo, New York.

That as an attorney he has participated in many litigated matters over the years including considerable experience in the field of bankruptcy law and he is familiar with fees awarded and paid for legal services during this period of time.

That your deponent has read the petition of applicant L. ROBERT LEISNER sworn to on April 27, 1974 and Mr. Leisner's affidavit sworn to on December 5, 1975 both pertaining to legal services he rendered in the above named bankruptcy.

That said petition and affidavit with their accompanying exhibits demonstrates to your deponent that the fee request of petitioner L. ROBERT LEISNER in the amount of \$18,500.00 (plus disbursements) is reasonable and proper especially in view of the following:

That the Dummond matter was a very tangled and involved bankruptcy

which required a division of services and responsibilities between co-counsel for the trustee. The sworn statements of Mr. Leisner indicates that there was no duplication of legal effort or time when related either to the services performed by co-counsel DAVID J. GOLDSTEIN or the prior legal services of JOHN SWERDLOFF, deceased.

That the general creditors of the bankrupt were confronted with a mortgage held by the Manufacturers and Traders Trust Company of Buffalo, New York in the amount of \$125,000, which, if sustained as a lien, would have wiped out any chance that such general creditors would share in the bankrupt's estate.

It was through the skillful and tireless efforts of Mr. Leisner that a settlement was reached which resulted in the bank releasing to the bankrupt's estate rents and a cash payment totalling \$86,833.35 which was the major factor in further realizing \$21,338.59 in interest; also the bank released a deficiency judgment of \$51,876.93.

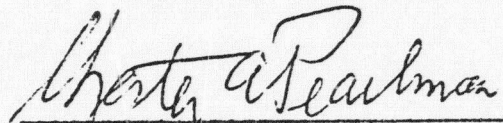
Further, Mr. Leisner had to commence legal actions to clear the bankrupt's property from tenancies and a purchase option, and through his diligent efforts he cleared the property of encumbrances so it could be sold pursuant to the aforesaid settlement agreement with the Manufacturers and Traders Trust Company.

Mr. Leisner's work also involved a complete analysis of the business records and tax status of the bankrupt and the filing of income tax returns on behalf of the trustee which resulted in a "no tax" determination and the acceptance of these returns as filed by the Internal Revenue Service.

Your deponent also noted that there was no opposition by either creditors or attorneys to Mr. Leisner's fee request of \$18,500; further, Mr. Leisner has had considerable experience in tax and other litigated matters

which aided in a material way the legal results which made a substantial portion of the bankrupt's estate available for claims of general creditors.

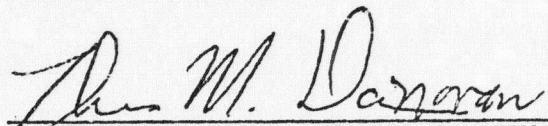
Mr. Leisner's request of \$18,500 for 320 hours of legal service computes to a rate of \$60.00 per hour which, based on the petitioner's skill, experience, and the attaining of a very beneficial result, is fair and reasonable. Based on my experience as an attorney involved in litigated matters and my knowledge of fees charged by, and awarded to, attorneys, the requested fee of \$18,500 for work performed subsequent to December 1, 1966, is, in my opinion, proper.



CHESTER A. PEARLMAN

Sworn to before me this

9th day of February, 1976.



NOTARY PUBLIC - STATE OF NEW YORK

Thomas M. Donovan
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1976

1 161 Washington Ave., Albany, N.Y. 12210
2 68 Sewall St., Augusta, Maine 04330
3 JFK Federal Bldg., Boston, Mass. 02203
4 35 Tillary St., Brooklyn, N.Y. 11201

5 34 W. Mohawk St., Buffalo, N.Y. 14202
6 11 Elmwood Ave., Burlington, Vt. 05401
7 450 Main St., Hartford, Conn. 06115

8 P.O. Box 3100, New York, N.Y. 10015
9 80 Daniel St., Portsmouth, N.H. 03801
10 544 Elmwood Ave., Providence, R.I. 02907

Address any reply to DISTRICT DIRECTOR at office No. _____

US Treasury Department

P. O. Box 180

Niagara Square Station, Buffalo, NY 14201

District Director

Internal Revenue Service

Date:

In reply refer to:

37

AU:ST

MAR 26, 1971

Mr. L. Robert Leisner
806 Rand Building - Lafayette Square
Buffalo, New York 14203

Dear Mr. Leisner:

Your Letter Dated: March 20, 1970
Taxable Year: 12/31/67, 12/31/68 and 12/31/69

Under the provisions of section 6501(d) of the Internal Revenue Code, you requested prompt assessment for the above taxable year with respect to:

☐ Your income tax return

☒ An income tax return filed by Albert W. Dummond, Inc. Bkpt.
c/o Louis Sternberg, Trustee, 500 Walbridge Bldg.
Buffalo, NY 14220

The income tax return has been accepted as filed.

Very truly yours,
District Director

Exhibit 6

d

1 161 Washington Ave., Albany, N.Y. 12210
2 68 Sewall St., Augusta, Maine 04330
3 JFK Federal Bldg., Boston, Mass. 02203
4 P.O. Box 991, Brooklyn, N.Y. 11202

5 111 West Huron Street, Buffalo, N.Y. 14202
6 11 Elmwood Ave., Burlington, Vt. 05401
7 450 Main St., Hartford, Conn. 06115

8 P.O. Box 3100, New York, N.Y. 10008
9 80 Daniel St., Portsmouth, N.H. 03801
10 130 Broadway, Providence, R.I. 02903

Department of the Treasury

Address any reply to DISTRICT DIRECTOR at office No. 5

38

District Director Internal Revenue Service

Date:

March 7, 1975

In reply refer to:

AU: RPM Class.

716-842-3497



Mr. L. Robert Leisner
Attorney at Law
1 Arundel Road
Buffalo, NY 14216

Dear Mr. Leisner:

Your Letter Dated: November 30, 1974
Form Number: 1120
Tax Periods Ended: 12-31-71, 12-31-72, & 12-31-73
Tax Returns of: Albert W. Dummond, Inc.
c/o Louis Sternberg Trustee
500 Walbridge Bldg.
Buffalo, NY 14202

We received your request for prompt assessment under the provisions of section 6501(d) of the Internal Revenue Code. We are glad to tell you we have accepted the returns as filed and you will not need to take any further action.

Sincerely yours,
District Director

Exhibit 7

